

United States District Court  
Eastern District of California

James Hines,

Plaintiff,

vs.

Nuckle, et al.,

Defendants.

No. Civ. S 03-2385 GEB PAN P

Findings and Recommendations

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Plaintiff is a state prisoner without counsel prosecuting a civil rights action. Plaintiff claims defendants violated his Eighth Amendment rights in July of 2001, when they failed to protect him from being attacked by his cell-mate and failed to provide medical care for some of the injuries he sustained in the attack.

Presently before court is plaintiff's April 26, 2005, motion for summary judgment, which defendants opposed August 30, 2005.

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1 Governing Legal Standard

2 A party may move, without or without supporting affidavits,  
3 for a summary judgment and the judgment sought shall be rendered  
4 forthwith if the pleadings, depositions, answers to  
5 interrogatories, and admissions on file, together with the  
6 affidavits, if any, show that there is no genuine issue as to any  
7 material fact and that the moving party is entitled to a judgment  
8 as a matter of law. Fed. R. Civ. P. 56(a)-(c).

9 An issue is "genuine" if the evidence is such that a  
10 reasonable jury could return a verdict for the opposing party.  
11 Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). A fact is  
12 "material" if it affects the right to recover under applicable  
13 substantive law. Id. The moving party must submit evidence that  
14 establishes the existence of an element essential to that party's  
15 case and on which that party will bear the burden of proof at  
16 trial. Celotex Corporation v. Catrett, 477 U.S. 317, 322 (1986).  
17 The moving party "always bears the initial responsibility of  
18 informing the district court of the basis for its motion and  
19 identifying those portions of 'the pleadings, depositions,  
20 answers to interrogatories, and admissions on file, together with  
21 the affidavits, if any'" that the moving party believes  
22 demonstrate the absence of a genuine issue of material fact. Id.  
23 at 323. If the movant does not bear the burden of proof on an  
24 issue, the movant need only point to the absence of evidence to  
25 support the opponent's burden. To avoid summary judgment on an  
26 issue upon which the opponent bears the burden of proof, the

1 opponent must "go beyond the pleadings and by her own affidavits,  
2 or by the "depositions, answers to interrogatories, and  
3 admissions on file,' designate 'specific facts showing that there  
4 is a genuine issue for trial.'" Id. at 324. The opponent's  
5 affirmative evidence must be sufficiently probative that a jury  
6 reasonably could decide the issue in favor of the opponent.

7 Matsushita Electric Industrial Co., Inc. v. Zenith Radio  
8 Corporation, 475 U.S. 574, 588 (1986). When the conduct alleged  
9 is implausible, stronger evidence than otherwise required must be  
10 presented to defeat summary judgment. Id. at 587.

11 Fed. R. Civ. P. 56(e) provides that "supporting and opposing  
12 affidavits shall be made on personal knowledge, shall set forth  
13 such facts as would be admissible in evidence, and shall show  
14 affirmatively that the affiant is competent to testify to the  
15 matters stated therein." Nevertheless, the Supreme Court has  
16 held that the opponent need not produce evidence in a form that  
17 would be admissible at trial in order to avoid summary judgment.  
18 Celotex, 477 U.S. at 324. Rather, the questions are (1) whether  
19 the evidence could be submitted in admissible form and (2) "if  
20 reduced to admissible evidence" would it be sufficient to carry  
21 the party's burden at trial. Id. at 327. Thus, in Fraser v.  
22 Goodale, 342 F.3d 1032 (9th Cir. 2003), objection to the opposing  
23 party's reliance upon her diary upon the ground it was hearsay  
24 was overruled because the party could testify to all the relevant  
25 portions from personal knowledge or read it into evidence as  
26 recorded recollection.

1 A verified complaint based on personal knowledge setting  
2 forth specific facts admissible in evidence is treated as an  
3 affidavit. Schroeder v. McDonald, 55 F.3d 454 (9th Cir. 1995);  
4 McElyea v. Babbitt, 833 F.2d 196 (9th Cir. 1987). A verified  
5 motion based on personal knowledge in opposition to a summary  
6 judgment motion setting forth facts that would be admissible in  
7 evidence also functions as an affidavit. Johnson v. Meltzer, 134  
8 F.3d 1393 (9th Cir. 1998); Jones v. Blanas, 393 F.3d 918 (9th  
9 Cir. 2004).

10 Defects in opposing affidavits may be waived if no motion to  
11 strike or other objection is made. Scharf v. United States  
12 Attorney General, 597 F.2d 1240 (9th Cir. 1979) (incompetent  
13 medical evidence).

14 Application

15 The Eighth Amendment prohibits prison officials from  
16 deliberate indifference to a substantial risk of serious harm to  
17 a prisoner. Wilson v. Seiter, 501 U.S. 294 (1991). "Deliberate  
18 indifference" is a state of mind more blameworthy than mere  
19 negligence. Whitley v. Albers, 475 U.S. 312 (1986). The  
20 defendant must know of but disregard an excessive risk of harm;  
21 he must know the facts from which the inference of harm should be  
22 drawn and also draw the inference. Id. Failure to abate a risk  
23 that should have been perceived but was not does not violate the  
24 Eighth Amendment. Id.

25 Plaintiff fails to establish he is entitled to summary  
26 judgment on claims some defendants failed to protect him from

1 attack by his cellmate. He declares defendants Tutor, Roberts,  
2 Nuckle and Gale knew, before plaintiff's cell-mate attacked him,  
3 that plaintiff faced a substantial risk of serious harm, but  
4 disregarded the risk. Defendants controvert plaintiff's  
5 declaration in opposing summary judgment. Disputed material  
6 facts preclude summary judgment for plaintiff.

7 "The unnecessary and wanton infliction of pain upon  
8 incarcerated individuals under color of law constitutes a  
9 violation of the Eighth Amendment . . ." McGuckin v. Smith, 974  
10 F.2d 1050, 1059 (9th Cir. 1991). A violation of the Eighth  
11 Amendment occurs when prison officials deliberately are  
12 indifferent to a prisoner's medical needs. Id. The threshold  
13 for a medical claim under the Eighth Amendment is extremely high:

14 A prison official acts with "deliberate indifference .  
15 . . only if [he] knows of and disregards an excessive  
16 risk to inmate health and safety." Gibson v. County of  
17 Washoe, Nevada, 290 F.3d 1175, 1187 (9th Cir. 2002)  
18 (citation and internal quotation marks omitted). Under  
19 this standard, the prison official must not only "be  
20 aware of facts from which the inference could be drawn  
21 that a substantial risk of serious harm exists," but  
22 that person "must also draw the inference." Farmer v.  
23 Brennan, 511 U.S. 825, 837 (1994). "If a [prison  
24 official] should have been aware of the risk, but was  
25 not, then the [official] has not violated the Eighth  
26 Amendment, no matter how severe the risk." Gibson, 290  
F.3d at 1188 (citation omitted). This "subjective  
approach" focuses only "on what a defendant's mental  
attitude actually was." Farmer, 511 U.S. at 839.  
"Mere negligence in diagnosing or treating a medical  
condition, without more, does not violate a prisoner's  
Eighth Amendment rights. McGuckin, 974 F.2d at 1059  
(alteration and citation omitted).

25 Toguchi v. Chung, 391 F.3d 1051, 1057 (9th Cir. 2004) (footnote  
26 omitted).

1 "Deliberate indifference to medical needs may be shown by  
2 circumstantial evidence when the facts are sufficient to  
3 demonstrate that a defendant actually knew of a risk of harm."  
4 Lolli v. County of Orange, 351 F.3d 410, 421 (9th Cir. 2003)  
5 (citations omitted); see also Gibson, 290 F.3d at 1197  
6 (acknowledging a plaintiff may demonstrate that officers "must  
7 have known" of a risk of harm by showing the medical need was  
8 obvious and extreme). Delay in medical treatment can amount to  
9 deliberate indifference if (1) the delay seriously affected the  
10 medical condition for which plaintiff was seeking treatment, and  
11 (2) defendants were aware the delay would cause serious harm.  
12 Shapley v. Nevada Board of State Prison Commissioners, 766 F.2d  
13 404, 408 (9th Cir. 1985).

14 Plaintiff provides no evidence, in seeking summary judgment,  
15 that his medical needs posed a substantial risk of serious harm,  
16 and defendants knew of yet disregarded that risk. Plaintiff  
17 declares some of the defendants refused to permit medical staff  
18 to treat some of his injuries, but he offers no evidence any of  
19 the injuries were serious and required care to avoid the risk of  
20 harm.

21 Accordingly, the court hereby recommends plaintiff's April  
22 26, 2005, motion for summary judgment be denied.

23 Pursuant to the provisions of 28 U.S.C. § 636(b)(1), these  
24 findings and recommendations are submitted to the United States  
25 District Judge assigned to this case. Written objections may be  
26 filed within 20 days of service of these findings and

1 recommendations. The document should be captioned "Objections to  
2 Magistrate Judge's Findings and Recommendations." The district  
3 judge may accept, reject, or modify these findings and  
4 recommendations in whole or in part.

5 Dated: February 7, 2006.

6 /s/ Peter A. Nowinski

7 PETER A. NOWINSKI

8 Magistrate Judge  
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